Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

IN THE MATTER OF:

BENJAMIN S. EICHHOLZ,

Petitioner.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

I. WHETHER, DUE TO A LACK OF ADEQUATE NOTICE REGARDING THE BANKRUPTCY COURT'S CLAIMS THAT PETITIONER ASSISTED OTHERS IN THE UNAUTHORIZED PRACTICE OF LAW OF THE BANKRUPTCY COURT, ITS DISCIPLINARY INVESTIGATION OF PETITIONER WAS WANTING IN DUE PROCESS AS RECOGNIZED BY THIS COURT IN IN RE RUFFALO, 390 U.S. 544, 88 S.Ct. 1222, (1968).

II. WHETHER PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE BANKRUPTCY COURT REQUIRED PETITIONER TO SPECULATE AS TO THE AMOUNT OF PREPARATION PETITIONER NEEDED TO PROVIDE TO HIS SUBSTITUTE COUNSEL.

III. WHETHER PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE BANKRUPTCY COURT FAILED TO PROVIDE AN IMPARTIAL FACTFINDER DURING PETITIONER'S DISCIPLINARY PROCEEDINGS.

II. PARTIES TO PROCEEDING

Set forth below is a complete list of the persons, associations of persons, firms, partnerships, or corporations, and any other identifiable legal entities related to the party that have been identified as a party to the proceeding as required by Supreme Court Rule 14.1(b):

1. Benjamin S. Eichholz;

2. The Law Office of Benjamin Sheftall Eichholz, P.C.

III. TABLE OF CONTENTS

		Page
I.	QUESTIONS PRESENTED	i
II.	PARTIES TO PROCEEDING	ii
III.	TABLE OF CONTENTS.	.iii
IV.	TABLE OF AUTHORITIES	v
V.	CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED BELOW	1
VI.	BASIS OF JURISDICTION	2
VII.	CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED	3
VIII.	STATEMENT OF THE CASE	5
	A. Statement of Material Facts	5
	B. Basis for Federal Jurisdiction in the Court of First Instance	8
IX.	REASONS FOR GRANTING A WRIT OF CERTIORARI	9
	A. The United States Bankruptcy Court of the Southern District of Georgia Violated Petitioner's Right to Procedural Due Process as Recognized by the Fifth Amendment to the Constitution When It Failed to Provide	

Adequate Notice of the Charges Against Petitioner Prior to Petitioner's Show Cause Hearing 9

1. The Bankruptcy Court failed to give adequate notice of all charges against Petitioner when it added charges against Petitioner during the show cause hearing 10

2. The Bankruptcy Court's notice set forth charges different from those for which Petitioner was ultimately punished 16

3. The Bankruptcy Court's notice contained charges so vague as to deny Petitioner notice of the underlying charges 19

B. Petitioner's Due Process Rights Were Violated When the Bankruptcy Court Required Petitioner to Speculate as to the Amount of Preparation Petitioner Needed to Provide to His Substitute Counsel 22

C. Petitioner's Procedural Due Process Rights Were Violated When the Bankruptcy Court Failed To Provide An Impartial Decision-maker During Petitioner's Disciplinary Proceedings, Instead Providing a Judge Who Acted As Judge, Jury, Prosecutor and Witness 25

X. CONCLUSION 30

XI. APPENDIX ix

IV. TABLE OF AUTHORITIES

Page(s)

CASES

Supreme Court:

Application of Gault, 387 U.S. 1, 87 S.Ct. 1428 (1967)..... 22

Bouie v. City of Columbia, 378 U.S. 347 (1964) 12

Cafeteria and Rest. Workers Union, Local 473 v. McElroy, 367 U.S. 886, 81 S.Ct.1743 (1961)..... 9

Connally v. General Const. Co., 269 U.S. 385, 46 S.Ct. 126 (1926)..... 23

Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983 (1972) 26

Giaccio v. Pennsylvania, 382 U.S. 399, 86 S.Ct. 518 (1966)..... 23

Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011 (1970)..... 9

Gray v. Netherland, 518 U.S. 152, 116 S.Ct. 2074 (1996). 12

Greene v. McElroy, 360 U.S. 474, 79 S. Ct. 1400 (1959)..... 27, 29

In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, (1968) .... *passim*

In re Snyder, 472 U.S. 634, 105 S.Ct. 2874 (1985)..... 9

International Harvester Co. v. Kentucky, 234 U.S. 216, 34 S.Ct. 853 (1914)..... 23

Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618 (1939) 23

Matthews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893 (1976) 27, 28

Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593 (1972) 28

Selling v. Radford, 243 U.S. 46, 37 S.Ct. 377(1917) 10

United States Court of Appeals:

Ciechon v. City of Chicago, 686 F.2d 511 (7th Cir. 1982). 27

Committee on Professional Ethics and Grievances v. Johnson, 447 F.2d 169 (3d Cir. 1971)..... 16, 17

In the Matter of the Disciplinary Proceedings of Phelps, 637 F.2d 171 (10th Cir. 1981) 16

In the Matter of Calvo, 88 F.3d 962 (11th Cir. 1996)..... 2

In re Finkelstein, 901 F.2d 1560 (11th Cir. 1990) 23, 24

Megill v. Bd. of Regents of the State of Florida, 541 F.2d 1073 (5th Cir. 1976)..... 27

State Cases:

Statewide Grievance Committee v. Botwick, 226 Conn. 299, 627 A.2d 901 (1993) 16

In re Armstrong, 205 La. 67, 16 So. 2d 908 (1943)..... 20

Matter of Levine, 17 Ariz. 146, 847 P.2d 1093 (1993) 20, 21

Myers v. Mississippi State Bar, 480 So.2d 1080 (Miss. 1986) 16

State ex rel. Shackelford v. McElhinney, 145 S.W. 1139 (Mo. 1912) 29

State v. Turner, 217 Kan. 574, 538 P.2d 966 (1975) 20

RULES

GA. RULES OF PROF'L CONDUCT 1.1 cmt. 5 (2001) 24, 25

GA. R. PROF. CONDUCT 1.3 (2001) 18

GA. R. PROF. CONDUCT 5.3 (2001) 19

GA. R. PROF. CONDUCT 5.5 (2001) 19

GA. RULES OF PROF'L CONDUCT 9.4 (2001) 8

LR 83.5(d) 3

LR 83.5(g) 3

STATUTES AND AMENDMENTS

28 U.S.C.A. § 1254 (West 2007) 2

28 U.S.C.A. § 1654 9

28 U.S.C.A. § 2071 9

U.S. CONST. art. III, § 2 2

U.S. CONST. amend V 2, 3, 9

V. CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OFTHE OPINIONS AND ORDERS ENTERED BELOW

United States Court of Appeals for the Eleventh Circuit:

In re: Benjamin Eichholz, No. 06-14476 (11th Cir. filed January 10, 2007)(*per curiam*).

In re: Benjamin Eichholz, No. 06-14476 (11th Cir. filed February 16, 2007).

U.S. District Court for the Southern District of Georgia:

In the matter of: Benjamin S. Eichholz, Misc. No. 4:06-00029 (S.D.GA filed July 17, 2006).

In the matter of: Benjamin S. Eichholz, Misc. No. 4:06-00029 (S.D.GA filed June 2, 2006).

United States Bankruptcy Court:

Memorandum and Order, United States Bankruptcy Court for the Southern District of Georgia (filed December 5, 2005).

Proposed Findings of Fact and Recommendation for Disciplinary Action, United States Bankruptcy Court for the Southern District of Georgia (filed May 26, 2006).

VI. BASIS OF JURISDICTION

This is an appeal from the decision of the United States Court of Appeals for the Eleventh Circuit affirming the United States District Court of the Southern District of Georgia in its suspension of Petitioner and the Bankruptcy Court's recommendation for suspension of Petitioner from the practice of law in the District Court for a period of two (2) years. The Eleventh Circuit Court of Appeals' decision was filed on January 10, 2007, and denied Petitioner's petition for rehearing and request for oral argument on petition for rehearing on February 16, 2007. Since 28 U.S.C.A. § 1254(1) allows this Court to review matters from the United States Courts of Appeal on the grant of a writ of certiorari, this Court has jurisdiction to review the following matter.

In addition to this Court's jurisdiction based on 28 U.S.C.A. § 1254(1), this Court retains jurisdiction over the subject matter of this dispute as the matter is one of a constitutional nature involving the Fifth Amendment to the United States Constitution. U.S. CONST. amend V. Furthermore, "[b]ar admissions, bar disciplinary actions, and disbarments are essentially judicial in nature and thus present a 'case or controversy' necessary for exercise of federal jurisdiction." In the Matter of Calvo, 88 F.3d 962 (11th Cir. 1996); see, U.S. CONST. art. III, § 2.

VII. CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

U.S. CONST. amend V.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall any person be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

LR 83.5(d), United States District Court for the Southern District of Georgia

"The standards of professional conduct of attorneys appearing in a case or proceeding, or representing a party in interest in such a case or proceeding, are governed by the Georgia Bar Rules of Professional Conduct and the American Bar Association's Model Rules of Professional Conduct. When a conflict arises, the Georgia Rules of Professional Conduct shall control. A violation of any of these rules in connection with any matter pending before this Court may subject the attorney to appropriate disciplinary action."

LR 83.5(g), United States District Court for the Southern District of Georgia

"Where in a matter pending before an Article I Judge

it appears that any attorney appearing in case or proceeding, or representing a party in interest in such case or proceeding, has violated any of the rules referred to in subparagraph (d), the Article I Judge may initiate a proceeding in conformity with subparagraphs (a) and (d) through (f) of this Rule, may terminate the proceeding at any stage when the question raised is unsupported or unsubstantiated, and, if the proceeding is not terminated, shall at the conclusion of the proceeding submit to the Chief Judge of this Court proposed findings of fact and, where appropriate, a recommendation for the discipline of the offending member.

The Article I Judge shall file his proposed findings and recommendations with the Court under seal and a copy thereof shall forthwith be mailed by the Clerk to the subject of the disciplinary action, who shall have ten days after service to file written objections to the proposed findings and recommendations.

The Chief Judge of the District Court, or a District Judge designated by him, shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings and recommendations made by the Article I Judge. The Chief Judge or his designee may also receive further evidence or recommit the matter to the Article I Judge with instructions.

This local rule is not intended to limit the power of the Article I Judge to exercise such criminal and civil contempt as conferred by Statute or Rule."

VIII. STATEMENT OF THE CASE

A. Statement of Material Facts

On December 5, 2006, the United States Bankruptcy Court for the Southern District of Georgia entered a Memorandum and Order requiring Petitioner to show cause why he should not be disciplined for his conduct in three prior bankruptcy cases, In the matter of: Linda J. Bacon, In the matter of: James J Forsythe and Janice F. Forsythe, and In the matter of: Sabrina N. Stanley. (See 59-A). In the Memorandum and Order, the charges against Petitioner by the Bankruptcy Court were as follows: (1) that Petitioner previously assured the court that he would appear in all cases in which his presence was required and Petitioner failed to do so; (2) that Petitioner's pleadings were "sloppy at best and misleading at worst;" (3) that Petitioner had disbursed settlement proceeds prior to settlement approval from the client; (4) that Petitioner failed to communicate in a professional manner with his clients and settled cases without the clients' consent; and (5) that Petitioner failed to appear at all regularly scheduled hearings, failed to have substitute counsel regularly associated with him appear, and failed to adequately prepare substitute counsel. (See 71-A to 72-A). The Bankruptcy Court's Memorandum and Order dated December 5, 2005 did not request Petitioner to show cause, if any, that he properly supervised nonlawyer employees to ensure their conduct was compatible with the professional obligations of lawyers or that he did not assist nonlawyers in the unauthorized practice of law by having office staff members sign pleadings and perform the functions of a lawyer.

On December 15, 2005, Petitioner filed a response to the Bankruptcy Court's Memorandum and Order. (See 39-

A). In his response, Petitioner addressed the Bankruptcy Court's allegations, discussing at length the reasons he believed his pleadings to that court contained clerical errors, his intra-office procedures for communicating with the courts and his clients, the reasons for any problems regarding his attendance at the hearings for the above-referenced cases, and his substitute's preparation for the pertinent hearings. (See 39-A to 58-A). In attempting to respond to the Bankruptcy Court's claim that Petitioner performed "sloppy" work, Petitioner stated that "clearly these erroneous amounts were amounts contained in a prior Order that our paralegal, Cindy Barnette, utilized for the preparation of this form." (42-A). Consequently, when the Bankruptcy Court charged Petitioner with sloppy work and Petitioner attempted to explain why the clerical mistake had occurred in the pleadings, Petitioner was lulled into a false sense of security that he could rebut the charges without any reciprocal effect.

On January 13, 2006, the Bankruptcy Court conducted its show cause hearing, requiring that Petitioner to show cause, if any, why he should not be reprimanded. (See 27-A). At the commencement of the hearing, Judge Davis, the presiding officer for the Bankruptcy Court, stated that in making its determination, the Court would consider its Memorandum and Order filed on December 5, 2005 and the Petitioner's response to the Memorandum and Order. (See 28-A). After the judge's introduction, the court stated that the Petitioner's should begin his opening statement. (See 29-A). During Petitioner's opening statement, Petitioner's counsel attempted to explain Petitioner's office procedures and any issues regarding Petitioner's representation of his clients in the cases in question. (See 30-A to 34-A).

As Petitioner's counsel concluded the opening statement, Judge Dalis, one of the two sitting Bankruptcy Court judges, interjected that he wanted to state his concerns

so that Petitioner did not conclude his case without addressing the judge's concern. (See 36-A). Judge Dalis then stated, "[M]y biggest concern involving Mr. Eichholz and his office is the fact that he had caused to be filed pleadings with the Court which represented to have been signed by him, which were never signed by him and which he did not read and review before they were filed." (36-A). Further, Judge Dalis stated that Petitioner "allowed -- it appears from what I am reading now in your supplemental response – someone not lawyer, a secretary basically, to sign, to create a document, sign it and file it without [Petitioner] ever having seen or reviewed it." (37-A).

On May 26, 2006, the Bankruptcy Court issued its "Proposed Findings of Fact and Recommendation for Disciplinary Action." (See 9-A). The Bankruptcy Court stated that its decision was "based on the testimony at the show cause hearing, on supporting documents from Eichholz and others, and on findings in prior proceedings." (10-A). The Bankruptcy Court noted that the root causes of the events that compelled the court's attention were Petitioner's failure to personally manage his case files and communicate with associate and nonlawyer staff. (12-A). Additionally, the court found that its recommendation was based, among other things, on the following findings: (1) that nonlawyer staff explained the terms of engagement to prospective clients; (2) that nonlawyer staff explained settlement documents to clients; (3) that nonlawyer staff signed Petitioner's name to pleadings and other court documents; (4) that Petitioner did not prepare or review bankruptcy pleadings before they were filed, (5) that Petitioner's associate signed his name to pleadings; (6) that nonlawyer staff prepared and filed bankruptcy pleadings with no attorney supervision; and (7) that many documents were filed with numerous clerical errors. (12-A to 13-A). Out of the eleven findings that the Bankruptcy Court based its

recommendation on, seven of the claims were based on information Petitioner disclosed to the court at the hearing. Based on the findings from both the hearing and the response from Petitioner to the Bankruptcy Court's prior Memorandum and Order, Petitioner was essentially tricked into incriminating himself.

On July 17, 2006, the District Court, relying on a review of the record alone, accepted the Proposed Findings of Fact and Recommendation that the Bankruptcy Court submitted to it pursuant to Local Rule 83.5(g), and entered an Order suspending Appellant from practicing law in the District Court for a period of two (2) years. (See 5-A). On January 10, 2007, the United States Court of Appeals for the Eleventh Circuit affirmed the District Court order, finding that the District Court had neither abused its discretion nor violated Petitioner's due process rights. (See 1-A).

As a result of the Bankruptcy Court's findings and recommendation for disciplinary action and the District Court's adoption of that recommendation, the State Bar of Georgia has begun its process for executing a reciprocal disciplinary action against Petitioner. See GA. RULES OF PROF'L CONDUCT 9.4 (2001). As a result of the Bankruptcy Court's violation of Petitioner's due process rights, Petitioner is prevented from practicing, ultimately concluding his career, in the federal court, and will most likely be prevented from continuing his livelihood at the state court level.

B. Basis for Federal Jurisdiction in the Court of First Instance

Federal courts have the inherent authority to suspend or disbar attorneys practicing before those courts, and this authority derives from the lawyer's role as an officer of the

court before which the lawyer is admitted. See In re Snyder, 472 U.S. 634, 643, 105 S.Ct. 2874 (1985). Moreover, federal courts are authorized under 28 U.S.C.A. §§ 1654 and 2071 to enact rules governing attorney conduct. See 28 U.S.C.A. §§ 1654, 2071. As such, the United States Bankruptcy Court and District Court for the Southern District of Georgia maintained the requisite basis for federal jurisdiction.

IX. REASONS FOR GRANTING A WRIT OF CERTIORARI

A. The United States Bankruptcy Court for the Southern District of Georgia Violated Petitioner's Right to Procedural Due Process as Recognized by the Fifth Amendment to the Constitution When It Failed to Provide Adequate Notice of the Charges Against Petitioner Prior to Petitioner's Show Cause Hearing.

The Fifth Amendment to the United States Constitution provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend V. In this respect, the due process clause recognizes certain procedural safeguards which guarantee that all individuals before the courts be accorded specific fundamental procedures should they be deprived of life, liberty or property; however, the breadth of those safeguards depends on the nature of the proceeding and the interests at stake. See Cafeteria and Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743 (1961), see, e.g., Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011 (1970). In this context, this Court has recognized that procedural due process safeguards contained in the Fifth Amendment apply to attorney disciplinary hearings due to the quasi-criminal nature of the proceeding. In re Ruffalo,

390 U.S. 544, 550-51, 88 S.Ct. 1222, 1226 (1968).

Under the procedural guarantees recognized by this Court, it is undisputed that when the conduct cited as the reason for discipline does not occur in the presence on judges in open court, "notice should be given to the attorney of the charges made.'" Ruffalo, 390 at 550 (citing Selling v. Radford, 243 U.S. 46, 37 S.Ct. 377(1917)). In the case at bar, the United States Bankruptcy Court for the Southern District of Georgia disregarded Petitioner's procedural guarantee to notice of the charges against him when the court altered the charges against Petitioner after filing its notice, set forth charges different from those for which Petitioner was ultimately punished, and gave notice of charges so vague as to deny Petitioner actual knowledge of the underlying charges. Due to the lower court's failure to provide adequate procedural protections, this Court must grant this Petition for Writ of Certiorari in order to reverse the decision of the Eleventh Circuit Court of Appeals.

1. The Bankruptcy Court failed to give adequate notice of all charges against Petitioner when it amended the charges against Petitioner during the show cause hearing.

Petitioner was deprived of notice that the Bankruptcy Court amended the charges against Petitioner until the conclusion of Petitioner's counsel's opening statement at the January 13, 2006 show cause hearing, resulting in the prejudice to Petitioner, which was irreconcilable at that point. (See 36-A to 37-A). In the Bankruptcy Court's Memorandum and Order, dated December 5, 2005, the Bankruptcy Court gave notice to Petitioner that they were concerned with his inability to attend hearings, his sloppy work, and the possibility that Petitioner had settled cases

without his client's approval. (71-A to 72-A). However, the Bankruptcy Court's Memorandum and Order, which provided Petitioner with information regarding the claims against Petitioner, did not make any mention of the court's expressed concerns that Petitioner filed pleadings that he never signed or read, or that Petitioner had office personnel perform the work of a licensed attorney. (See 59-A to 74-A). As such, when Judge Dalis informed Petitioner's counsel that he wanted Petitioner to address concerns of the court that Petitioner "had caused to be filed pleadings with the Court which represented to have been signed by him, which were never signed by him and which he did not read and review before they were filed," (36-A), the court effectively amended the charges against Petitioner to include the violations of assisting non-lawyers in the practice of law and violating his responsibilities to his non-lawyer assistants.

Notice to an attorney of the charges against him is inadequate when the disciplinary authority amends or alters the charges against the attorney either (1) at the disciplinary hearing or (2) at a time so late in the proceeding that the attorney has no opportunity to properly prepare to respond to the charges. See, e.g., Ruffalo, 390 U.S. at 546. In Ruffalo, this Court ruled that an attorney's due process rights were violated when the Ohio State Bar Association failed to provide notice as to the "precise nature of the charges" against the petitioner. Ruffalo, 390 U.S. at 552. The disciplinary panel in Ruffalo had provided the petitioner with notices of the charges against him, and after the petitioner provided testimony at the hearing, the disciplinary panel added an additional charge against the petitioner. Id. at 546. The Ohio State Bar Association argued that there was no violation because the petitioner had several months to respond to the additional charge. Id. at 551, n.4. However, in rejecting the bar association's argument, the Court opined that the bar association's argument "overlooks that fact that

serious prejudice to petitioner may well have occurred because of the content of the original 12 specifications of misconduct. He may well have been lulled 'into a false sense of security.'" Id. (citing Bouie v. City of Columbia, 378 U.S. 347, 352 (1964). Moreover, the Court stated, "[t]he charge must be known ***before the proceedings commence***. They become a trap when, after they are underway, the charges are amended on the basis of the testimony of the accused." Id. at 551. Due to the bar association's failure to provide notice of all charges prior to the commencement of the hearing, then adding charges once the petitioner incriminated himself, the Court found that the petitioner's procedural due process rights had been violated. Id. at 552. The facts of the instant matter are well within the holding at Ruffalo.

Although the attorney who is under investigation does not have a constitutional right to notice of the *evidence* that the state plans to use to prove the charges against him, see Gray v. Netherland, 518 U.S. 152, 154, 116 S.Ct. 2074 (1996), an attorney under investigation is entitled to notice of the charges which he must defend against, and if those charges are altered after the fact, the attorney's right to due process is violated. Id. (citing Ruffalo, 390 U.S. at 552). In the case at bar, the Bankruptcy Court clearly altered its course of the investigation of Petitioner and effectively amended the charges against Petitioner long after its notice to Petitioner and during the hearing. In the Bankruptcy Court's Memorandum and Order, the court discussed the proceedings from In the matter of: Linda J. Bacon, In the matter of: James J Forsythe and Janice F. Forsythe, and In the matter of: Sabrina N. Stanley, and then continued by discussing alleged prior instances in which Petitioner was either absent from a hearing or had his fees reduced at a hearing. (See 59-A to 72-A). At the conclusion of the Memorandum and Order, the Bankruptcy Court listed the

charges which it wanted Petitioner to respond to, which said charges were:

> (1) He assured the Court at the previous hearings in the Fuller and Glover cases that he would appear anytime the Court required his presence, and he failed to do that in each of these three cases.
>
> (2) His pleadings continue to be sloppy at best and misleading at worst. In each of these three cases, his Motion for Approval of the Settlement recites that he has already been approved to serve as counsel to these debtors in their personal injury cases when in fact no such Order has ever been entered in any of the three cases and in some, the amount of settlement of attorney's fees contain significant discrepancies.
>
> (3) He has apparently disbursed the settlement proceeds in at least one case before court approval of the settlement.
>
> (4) He has failed to communicate in a professional manner with his clients and has apparently settled cases without obtaining his clients' consent.
>
> (5) He has failed to appear as he is required to do in all regularly scheduled hearings that involve his personal injury representation of debtors before this Court, has failed to have substitute counsel regularly associated with him appear, and has lapsed into the incredible and unbelievable practice of engaging well-

> intentioned and highly respected counsel to appear, based on a last minute request, when they have no knowledge of the case and no professional relationship either with Mr. Eichholz as a regularly associated member of his firm or with the debtors who they purport to "stand in" for.

(71-A to 72-A). These charges clearly do not anticipate claims for assisting non-lawyers in the practice of law or violating responsibilities to non-lawyer assistants.

After Petitioner attempted to explain in his Response to the Memorandum and Order the reasons why he should not be punished for a violation of charges to which he was given notice, the Bankruptcy Court altered its charges and specifically requested that Petitioner address the court's concern that Petitioner allowed "someone not lawyer, a secretary basically, to sign, to create a document, sign it and file it without [Petitioner] ever having seen or reviewed it," (37-A). Furthermore, after Petitioner attempted to address these concerns at the show cause hearing, the Bankruptcy Court filed its recommendation to the district court, basing its recommendation almost completely on its findings regarding the new charges of assisting non-lawyers in the practice of law or violating responsibilities to non-lawyer assistants. (See 9-A to 24-A). The charges in the Bankruptcy Court's Proposed Findings of Fact and Recommendation for Disciplinary Action included,

> (1) Nonlawyer staff explained Eichholz's terms of engagement to prospective clients. Transcript of Motions Hearing (hereinafter cited as Tr.) at 63, 127, 176.
>
> (2) Nonlawyer staff explained settlement

documents to clients. Tr. At 112, 121, 155.

(3) Nonlawyer staff routinely signed Eichholz's name to pleadings and other papers filed with the clerk of court. Tr. At 130-32, 137-38, 140, 145, 150. These included pleadings filed during an eleven-day period, after entry of the Show Cause Order while Eichholz was away on vacation. Id. at 155.

(4) Eichholz did not prepare or review bankruptcy pleadings before they were filed. Tr. At 142, 265-66.

(5) Eichholz's associate routinely signed his name to pleadings in accordance with his office procedures. Response of Benjamin S. Eichholz to Memorandum and Order, attached as App. E at 4, 9.

(6) For a significant period of time, Eichholz's associate did not prepare or review bankruptcy pleadings before they were filed, and Eichholz was aware of that fact. Tr. At 273-76.

(7) Nonlawyer staff prepared and filed bankruptcy pleadings with no attorney supervision. App. F. ¶¶ 2-3.

(8) Many documents were filed with numerous clerical errors. Closing Argument Brief in Support of Benjamin S. Eichholz, attached as App. G. at 6.

(12-A to 13-A). Clearly, the charges included in the

recommendation are substantially different than those upon which the Bankruptcy Court's initial charges were predicated. Since the Bankruptcy Court amended the charges against Petitioner after Petitioner provided testimony in his response and at the show cause hearing, the initial charges were used as a "trap," and Petitioner's right to procedural due process under the Fifth Amendment was eviscerated.

2. The Bankruptcy Court's notice set forth charges different from those for which Petitioner was ultimately punished.

The Bankruptcy Court failed to provide adequate notice of the charges against Petitioner, and ultimately violated Petitioner's right to procedural due process, when Petitioner was initially put on notice in the Bankruptcy Court's Memorandum and Notice of the possibility of discipline for certain specified violations, but was subsequently disciplined for other violations. While this Court has never adopted a definite set of factors to determine whether notice to an attorney in a disciplinary action is adequate, circuit courts and state supreme courts have considered notice inadequate (and therefore a due process violation) when the disciplinary authority makes charges different from those for which the attorney is eventually punished. See In the Matter of the Disciplinary Proceedings of Phelps, 637 F.2d 171 (10th Cir. 1981); Committee on Professional Ethics and Grievances v. Johnson, 447 F.2d 169 (3d Cir. 1971); Statewide Grievance Committee v. Botwick, 226 Conn. 299, 627 A.2d 901 (1993); Myers v. Mississippi State Bar, 480 So.2d 1080 (Miss. 1986). Focusing on the issue of misrepresentation by the disciplining authority, courts have found that the dispositive issue is whether the respondent attorney was apprised of the charges before the commencement of the proceedings against him/her.

Johnson, 447 F.2d at 173.

For example, in Johnson, a committee on professional ethics investigated claims that the respondent-attorney violated rules of professional conduct, and recommended that formal charges be made against the attorney. Id. at 170-71. The district court adopted the findings of the committee on professional ethics, and charged the attorney with violating his duties to his client because he failed to disclose facts about a prior real estate transaction to his client. Id. at 171. Additionally, the district court separately charged the attorney with failing to deal with the additional parties to the real estate transaction candidly because he misled the other parties involved in the transaction into believing that he was their attorney. Id. at 171-72. During the findings, the attorney testified at length concerning the relationship between himself and his client, and did not address any claim that he misled the other parties into believing he was their attorney also. Id. at 173. Since the attorney was not warned of the charge that he misled the other parties until after he had testified about his attorney-client relationship, the Third Circuit Court of Appeals found that the attorney's right to due process had been violated. Id. Subsequently, the court noted that it would be erroneous to speculate how the attorney would have changed his argument had he originally been charged with a breach of the attorney-client relationship. Id.

The Bankruptcy Court in the case at bar charged Petitioner with disciplinary violations *different* from those to which Petitioner was ultimately punished. The Bankruptcy Court's Memorandum and Order listed the charges against Petitioner resulting from three matters to wit: Stanley, Forsythe, and Bacon hearings. As previously noted, the charges against Petitioner included: (1) that Petitioner previously assured the court that he would appear in all cases

in which his presence was required and Petitioner failed to do so; (2) that Petitioner's pleadings were "sloppy at best and misleading at worst;" (3) that Petitioner had disbursed settlement proceeds prior to settlement approval; (4) that Petitioner failed to communicate in a professional manner with his clients and settled cases without the clients' consent; and (5) that Petitioner failed to appear at all regularly scheduled hearings, failed to have substitute counsel regularly associated with him appear, and failed to adequately prepare substitute counsel. (71-A to 72-A). However, the District Court ultimately punished Petitioner for violations of the Georgia Rules of Professional Conduct 1.1, 1.2, 1.3, 1.4, 5.3, and 5.5. (See 5-A).

While some of the charges against Petitioner are contemplated within the violations for which Petitioner was charged, not all charges are encompassed within these violations. For example, the charge that Petitioner previously assured the court that he would appear in all cases in which his presence was required and Petitioner failed to do so and that Petitioner failed to attend all regularly scheduled hearings coincides with Georgia Rule 1.3, which requires a lawyer to act with reasonable diligence in representing his/her client and must not fully abandon or willfully disregard a legal matter entrusted to the lawyer. See GA. R. PROF. CONDUCT 1.3 (2001). As such, the charge against Petitioner arguably coincides with the violation for which Petitioner was ultimately punished.

In contrast, the District Court and the Bankruptcy Court in its Proposed Findings of Fact and Recommendation for Disciplinary Action also charged Petitioner with violating Georgia Rules of Professional Conduct 5.3 and 5.5; however, no charges in the Bankruptcy Court's Memorandum and Order even remotely provided notice that Petitioner was charged with violating Georgia Rules 5.3 or 5.5. (See 59-A

to 74-A). Georgia Rule 5.3 provides that partners in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that conduct is compatible with the professional obligations of the lawyer. GA. R. PROF. CONDUCT 5.3 (2001). Georgia Rule 5.3 only holds a partner responsible when the partner does not make reasonable efforts to ensure that the firm has measures giving reasonable assurance that the non-lawyer's conduct is compatible with the professional obligations of the lawyer, or a lawyer orders, or with the knowledge of the specific conduct ratifies, the conduct involved or the supervisory lawyer/partner knows of the conduct at the time when its consequences can be avoided or mitigated but fails to make reasonable remedial action. Id. Additionally, Rule 5.5 is a multi-jurisdictional rule that a lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal practice in that jurisdiction or assist another in doing so. GA. R. PROF. CONDUCT 5.5 (2001).

Similar to the Third Circuit Court of Appeals finding in Johnson and focusing on issue of misrepresentation by the disciplining authority, Petitioner was not apprised of the alleged violations of Georgia Rules 5.3 and 5.5 prior to the commencement of the show cause hearing or the filing of Petitioner's Response to the Memorandum and Order. Since the charges Petitioner was put on notice of were substantially different than those for which Petitioner was ultimately punished, this Court should extend the notice requirement in Ruffalo and find Petitioner's due process rights violated.

3. The Bankruptcy Court's notice contained charges so vague as to deny Petitioner notice of the underlying charges.

This Court should extend the due process notice requirement in this Court's decision in Ruffalo to include

instances in which the complaint or other disciplinary documents are so vague as to deny the attorney notice as to the underlying charges. This Court has never stated that notice to an attorney of a disciplinary investigation or complaint must be of a certain level of specificity to prevent a violation of the attorney's due process rights; however, lower courts have extended the notification requirements to prevent notice requirements from containing vague charges. See Matter of Levine, 174 Ariz. 146, 170, 847 P.2d 1093, 1117 (1993); In re Armstrong, 205 La. 67, 85-6, 16 So. 2d 908, 914 (1943). While it is incumbent upon every attorney in the legal profession to know and understand the rules of the profession, State v. Turner, 217 Kan. 574, 579, 538 P.2d 966, 972 (1975), this Court in Ruffalo was clearly concerned with disciplinary authorities lulling attorneys under investigation into providing additional information to help cement new charges against the attorney in question. See Ruffalo, 390 U.S. at 551, n.4. Based on this Court's policies preventing disciplinary authorities from "trapping" attorneys after testimony has been provided, this Court should find an attorney's due process rights violated when the charges of the disciplinary authority are so vague that they ultimately become a trap, lulling the attorney into testifying to matters which the attorney is unaware are at issue.

In In re Levine, the Arizona Supreme Court found a denial of the attorney's procedural due process rights when the complaint against the attorney was vague. Among the charges against the attorney was the allegation that in two prior cases the attorney violated the code and rules then in effect "by knowingly doing so or doing so through the acts of another." Levine, 174 Ariz. At 152, 847 P.2d at 1099. Focusing on the breadth and vagueness of the charge, the Arizona Supreme Court stated that the charge "did not meet procedural due process by giving the respondent either notice of the alleged acts of misconduct or any realistic

opportunity to defend himself against them." Id. at 170. Due to the vagaries, the court did not accept the commission's findings on the charge.

Here, the Bankruptcy Court, in its Memorandum and Order, provided Petitioner with acts for which they believed Petitioner to be in violation of the Georgia Rules of Professional Conduct; however, the Bankruptcy Court failed to provide any amount of specificity regarding the charges against Petitioner. (See 59-A to 74-A). As previously stated, the Bankruptcy Court charged Petitioner with failing to appear in all cases in which his presence was required and Petitioner failed to do so, filing pleadings that were "sloppy at best and misleading at worst," disbursing settlement proceeds prior to settlement approval, failing to communicate in a professional manner with his clients and settling cases without the clients' consent, and failing to appear at all regularly scheduled hearings, failing to have substitute counsel regularly associated with him appear, and failing to adequately prepare substitute counsel. (71-A to 72-A). Though these factual allegations are specific in and of themselves, they are vague as to the ultimate charge for which the Bankruptcy Court was trying to obtain testimony for. Based upon the final charges against Petitioner, the Bankruptcy Court was clearly fishing for additional charges against Petitioner when it set out these factual allegations which required Petitioner to speculate which violations of the Georgia Rules of Professional Conduct he was being charged with. The charges were vague and lulled Petitioner into providing information for which he did not know would lead to further charges against him, and as such, this Court should find Petitioner's procedural due process right violated.

B. Petitioner's Due Process Rights Were Violated When the Bankruptcy Court Required Petitioner to Speculate as to the Amount of Preparation Petitioner Needed to Provide to His Substitute Counsel.

The Bankruptcy Court's recommendation and the District Court's sanctions against Petitioner stem, in part, from Petitioner's preparation of his substitute counsel in two straightforward, personal injury settlement hearings for $1,000.00 and $7,500.00 respectively. Prior to the settlement hearings in In the matter of: Linda J. Bacon and In the matter of: James J Forsythe and Janice F. Forsythe, Petitioner's substitute counsel, Abda Quillian, obtained the settlement information pertaining to the two personal injury settlements. (76-A). Further, prior to the commencement of the hearings, Petitioner's substitute counsel spoke with the clients concerning each client's settlement agreement and each client's satisfaction with the settlement amounts. (76-A). Despite these methods of preparation for the settlement hearings, the Bankruptcy Court found that Ms. Quillian was ill-prepared. As a result, the Bankruptcy Court recommended, and the District Court affirmed, that Petitioner be sanctioned for failing to adequately prepare his substitute counsel. (See 9-A to 13-A).

When examining a district court's order of suspension, the relevant inquiry is whether the attorney could have been on notice that the courts would condemn the conduct for which the attorney was sanctioned. In re Finkelstein, 901 F.2d 1560, 1564 (11th Cir. 1990)(citing In re Ruffalo, 390 U.S. 544 (1968)). Attorney disciplinary hearings are adversary proceedings that are quasi-criminal in nature. See In re Ruffalo, 390 U.S. 544, 551, 88 S.Ct. 1222 (1968), cf. Application of Gault, 387 U.S. 1, 33, 87 S.Ct. 1428 (1967). For nearly one hundred years, this Court has

adhered to the principle that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." Connally v. General Const. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127 (1926), International Harvester Co. v. Kentucky, 234 U.S. 216, 34 S.Ct. 853 (1914). Moreover, as this Court stated in Lanzetta v. New Jersey, 306 U.S. 451, 458, 59 S.Ct. 618 (1939), "[A]ll are entitled to be informed as to what the State commands and forbids."

Where a law is so vague or indefinite that the public is left uncertain and empty-handed as to the conduct that the law prohibits, or "leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case," that law fails to meet the standards ingrained in the Due Process Clause. Giaccio v. Pennsylvania, 382 U.S. 399, 402-3, 86 S.Ct. 518 (1966). In this regard, the Court of Appeals for the Eleventh Circuit has established its "standard" in attorney disciplinary matters and found that to determine whether an attorney would have been on notice that his/her conduct would be condemned, the disciplinary authority should examine whether the behavior of the attorney is that which reasonable attorneys would recognize as improper for a member of the profession. See Finkelstein, 901 F.2d at 1564. In Finkelstein, the court of appeals found that the district court erred in sanctioning an attorney for six months where the attorney displayed an "unlawyerlike rudeness" and "gross misunderstanding of true professionalism" through the attorney's methods for advocating settlement negotiations with the opposing party. Id. The court further noted that the district court erred because the attorney could not have known that his method for attempting settlement negotiations would be considered improper and because no reasonable attorney would find

drafting a settlement letter, like the one in Finkelstein, improper for a member of the profession. Id. Since the attorney in Finkelstein had no notice of the impropriety of his act and reasonable attorneys would find no impropriety for the acts, this Court ordered the attorney's suspension vacated and reversed and remanded the case. Id. at 1565.

In the instant case, the Bankruptcy Court's determination that Petitioner failed to adequately prepare his substitute counsel for the settlement hearings in In the matter of: Linda J. Bacon and In the matter of: James J Forsythe and Janice F. Forsythe violated Petitioner's due process rights. No rule exists in the Georgia Rules of Professional Conduct, which the District Court for the Southern District of Georgia subscribes, regarding the amount of preparation that must be provided to substitute counsel. Additionally, with regard to an attorney's own preparation, the comment to Georgia Rule of Professional Conduct 1.1 states that "[t]he required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence." GA. RULES OF PROF'L CONDUCT 1.1 cmt. 5 (2001). Not only does the rule require attorneys, such as Petitioner, to guess at the meaning of the comment, which exists for the purpose of explaining the even more vague rule, but it also leads to a difference in the application of the rule depending on the party applying the rule. Due to the indefiniteness of the standard, no rule or standard regarding the amount of preparation of a substitute attorney exists at all, and penalizing Petitioner for failing to adequately prepare his substitute counsel violated Petitioner's due process rights.

In addition, the Bankruptcy Court and the District Court violated Petitioner's due process rights because Petitioner was not, in advance, put on notice regarding the

level of preparation he needed to provide his substitute, and no reasonable attorney could find impropriety in Petitioner's actions. Similar to the attorney in Finkelstein, Petitioner could have never been put on notice that providing Abda Quillian with the settlement documentation and her thereafter conversing with the clients prior to the hearing were insufficient. As previously noted, the Georgia Rules of Professional Conduct do not contain a rule pertaining to preparation of substitute counsel. Since the Rules require a lawyer to examine the complexity of the case and the amount at stake, it was reasonable for Petitioner to believe that a minimal amount of preparation for his substitute was required. GA. RULES OF PROF'L CONDUCT 1.1 cmt. 5 (2001). The settlement hearing, at the time, involved two straightforward, personal injury claims, one which was settled for $1,000.00 and the other which was settled for $7,500.00. Moreover, Petitioner's substitute had over twenty years of experience practicing law, and as such, Petitioner's substitute was capable of reviewing a file and understanding its contents. (75-A to 76-A). Since, in the most extreme circumstance, Petitioner's substitute counsel could have obtained any additional information from either Petitioner's office or the clients who were present at the hearings, Petitioner acted reasonably when he simply provided his substitute with the clients' files. Under the reasonable attorney standard put forth by the Eleventh Circuit in Finkelstein, no reasonable attorney would find that Appellants preparations of a twenty year veteran of the court were improper.

C. Petitioner's Procedural Due Process Rights Were Violated When the Bankruptcy Court Failed To Provide An Impartial Decision-maker During Petitioner's Disciplinary Proceedings, Instead Providing a Judge Who Acted As Judge, Jury, Prosecutor and Witness.

The Bankruptcy Court violated Petitioner's procedural due process when it allowed Judge Davis, a non-neutral factfinder, to preside over the show cause hearing and make a recommendation for discipline to the district court and when it allowed Judge Davis to act as prosecutor, judge, jury and witness during the disciplinary proceedings. Judge Davis relied upon cases that were over three-years old, which Judge Davis also presided in, as support for its findings that Petitioner continuously failed in his duties to the court and his clients. The only testimony offered concerning the prior cases came from Judge Davis himself in the Memorandum and Order. (See 65-A to 72-A). No opportunity was afforded Petitioner to question Judge Davis on his recollection of the underlying facts of those cases and the ultimate outcome, nor were the parties from the prior cases called to testify at the show cause hearing.

Moreover, Judge Davis was the presiding judge in In the matter of: Linda J. Bacon, In the matter of: James J Forsythe and Janice F. Forsythe, and In the matter of: Sabrina N. Stanley. Judge Davis ordered the show cause hearing, Judge Davis presided over the show cause hearing, and then Judge Davis recommended a sanction of two (2) years. (10-A, 24-A). Finally, during the show cause hearing, Judge Davis acted outside the scope of his duties by acting as prosecutor and questioning Petitioner's witnesses. Petitioner's due process rights would have been further protected had Judge Davis simply recused himself from the show cause hearing because then it could be said that a neutral fact finder presided. (See 10-A to 24-A).

The central meaning of procedural due process is that a party whose rights are to be affected is entitled to be heard at a meaningful time and in a meaningful manner. Fuentes v. Shevin, 407 U.S. 67, 80, 92 S. Ct. 1983 (1972)(quoting

Baldwin v. Hale, 1 Wall. 223, 233 (1864)). The right to practice a specifically chosen profession and to hold private employment free from unreasonable government interference is a private interest protected by due process. See Greene v. McElroy, 360 U.S. 474, 492, 79 S. Ct. 1400 (1959). Due process protections, however, are not free from limitation, and "[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." Matthews v. Eldridge, 424 U.S. 319, 334, 96 S. Ct. 893 (1976). That is, procedural due process "is not a technical conception with a fixed content unrelated to time, place, and circumstances." Id. Rather, procedural due process "is flexible and calls for such procedural protections as the particular situation demands." Id. When determining the confines of due process, courts must weigh the risk that procedures utilized by the court may erroneously deprive an individual of his/her private interest and the probable value, if any, of additional or substitute safeguards. Id. at 335. Additionally, courts must examine the government interest, including the function involved and the fiscal and administrative burdens, that the additional or substitute procedural requirements would entail. Id.

"No matter how complete the panoply of procedural devices which protect a particular liberty or property interest, due process requires that the procedures be applied neutrally." Ciechon v. City of Chicago, 686 F.2d 511, 517 (7th Cir. 1982). An impartial decision maker is a basic constituent of minimum due process. See Megill v. Bd. of Regents of the State of Florida, 541 F.2d 1073, 1080 (5th Cir. 1976). In Morrissey v. Brewer, the United States Supreme Court held that Due Process requires that in order to minimize risk that a parolee's parole is not wrongfully revoked, the determination that reasonable ground exists for revocation of parole should be made by someone not directly involved in the case. 408 U.S. 471, 485, 92 S. Ct. 2593

(1972). While it is not disputed whether Petitioner was provided an evidentiary hearing, it is disputed whether the fact finder's lack if neutrality prevented Petitioner from having a fair hearing in a fair manner. Similar to the Supreme Court's concern in Morrissey with having someone directly involved in the arrest of a parolee also determine parole revocation, here, this Court should find grave concern with the process utilized by the Bankruptcy Court in requesting and administering the show cause hearing for Petitioner.

Additionally, the administrative costs and burdens of providing a neutral fact finder are de minimus. Judge Dalis was already in attendance at the hearing. In light of the fact that the presiding judge should be reading the pleadings in the matter anyway, there would be no significant burden on the court to bring another judge up to speed. In addition, allowing Petitioner to confront his accuser in a meaningful manner (e.g. by allowing the use of direct examination questions) would also appear not to burden the administration of the court. "The risk of an erroneous deprivation of the [private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards" must weigh in favor of the appellant. Matthews, 424 U.S. at 335.

Finally, the Bankruptcy Court proceedings lacked a neutral fact finder. It was Judge Davis who imposed the discipline. Having already made up his mind, he could not be impartial at the "show cause" hearing, no matter how pure his intentions. The fact finder's lack of neutrality prevented Appellant from having a fair hearing in a fair manner. Judge Davis was the presiding judge in In the matter of: Linda J. Bacon, In the matter of: James J Forsythe and Janice F. Forsythe, and In the matter of: Sabrina N. Stanley. Judge Davis ordered the show cause hearing, Judge Davis presided

over the show cause hearing, and then Judge Davis recommended a sanction of two (2) years. As this Court is aware, Judge Dalis also presided over the hearing. (See 27-A to 38-A). Ironically, Petitioner's due process rights would have been further protected had Judge Davis simply recused himself from the show cause hearing because then it could be said that a neutral fact finder presided. Instead, Judge Davis presided over the hearing and placed his colleague, Judge Dalis, in the unenviable position of having to contradict his colleague's findings, if he disagreed with Judge Davis' interpretation or memory of the prior cases.

The right to practice a specifically chosen profession and to hold private employment free from unreasonable government interference is a right that comes within the "liberty" and "property" clause of the Fifth Amendment to the United States Constitution. Greene v. McElroy, 360 U.S. at 492. The government may subject members of a profession to reasonable regulation; however, the right of an attorney to practice law is a valuable property right which cannot be taken by an arbitrary decision of the court. See State ex rel. Shackelford v. McElhinney, 145 S.W. 1139, 1142 (Mo. 1912). Petitioner deserved a fair trial before an impartial judge; however, Petitioner received a hearing full of procedural irregularities and, ultimately, a career-ending suspension based on one judge's bias.

X. CONCLUSION

Wherefore, Petitioner respectfully requests that this Court grant the PETITION FOR WRIT OF CERTIORARI in the instant appeal.

Respectfully submitted this 13th day of July, 2007.

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